1992

Roy S. Ludlow Investment Company v. Thomas W. Ostler, Niel W. Ostler, Lee H. Ostler, Paul F. Ostler, John A. Vandermyde, Delbert Christensen, individually and all doing business as Design Label Manufacturing : Brief of Appellee

Utah Court of Appeals

Randy S. Ludlow; Attorney for Appellant.
John Burton Anderson; Kenneth M. Histake; Attorneys for Appellees.

IN THE UTAH COURT OF APPEALS

ROY S. LUDLOW INVESTMENT COMPANY, Plaintiff and Appellant, vs. THOMAS W. OSTLER, NEIL W. OSTLER, LEE H. OSTLER, PAUL F. OSTLER, JOHN A. VANDERMYDE, DELBERT CHRISTENSEN, individually and all doing business as DESIGN LABEL MANUFACTURING, Defendants and Appellees.	)	Case No. 920174 CA

BRIEF OF APPELLEES, THOMAS W. OSTLER, NEIL W. OSTLER AND JOHN A. VANDERMYDE

Appeal from the Third Judicial District Court
of Salt Lake County, State of Utah
The Honorable Frank G. Noel

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction to decide this appeal pursuant to Utah Code Ann. §78-2a-3(2)(j) (1953, as amended) and Rule 42 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES

1. Whether the trial court was correct in admitting parole evidence to determine the intention of the parties to a written lease agreement. The standard of review is for correctness of law with no particular deference given to the trial court's conclusion. However, once the trial court concludes that the document is ambiguous and proceeds to find

facts respecting the parties' intention, then the standard of review is strictly limited. The trial court's judgment will then not be disturbed if, after reviewing the evidence in a light most supportive of the court's findings, the evidence is based on substantial, competent, admissible evidence. Lyngle v. Lyngle, 184 Utah Adv. Rep. 65 (Utah App. 1992)

2. Whether the trial court's finding that the lease provided that the tenants and landlord would jointly review the contract at the end of each year for possible renewal is clearly erroneous and should be set aside. To properly challenge the trial court's findings, the Appellant must marshall all of the evidence in support of the trial court's findings and then demonstrate that even reviewing it in the light most favorable to the court below, the evidence is insufficient to support the findings. Lyngle v. Lyngle, supra. Scharf v. BMG Corp, 700 P.2d 1060 (Utah 1985)

3. Whether the trial court was correct in awarding attorney's fees to the Defendants.

STATUTES AND RULES DETERMINATIVE OF ISSUES ON APPEAL

Utah Code Ann. §78-27-56.5 Attorney's fees - Reciprocal rights to recover attorney's fees.

A court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed

after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees.

Rule 4-505 of the Rules of Judicial Administration - Attorney's fees affidavits.

(1) Affidavits in support of an award of attorney's fees must be filed with the court and set forth specifically the legal basis for the award, the nature of the work performed by the attorney, the number of hours spent to prosecute the claim to judgment, or the time spent in pursuing the matter to the stage for which attorney's fees are claim, and affirm the reasonableness of the fees for comparable legal services.

STATEMENT OF THE CASE

a. Nature of case and course of proceedings.

The trial of the matter was held on November 14, 1991, and judgment was rendered on behalf of Defendants against the Plaintiff, no cause of action by the Court sitting without a jury. The Defendants cumulatively were granted judgment for attorney's fees in the total amount of $2,500.00 to be divided amongst the seven Defendants equally.

Prior to the trial, the court denied Plaintiff's Motion in Limine to exclude parole evidence which Defendants proposed to offer in order to explain the terms of a lease

agreement which was the subject matter of the action commenced by Plaintiff.

Plaintiff has appealed the judgment of the trial court stating that the trial court improperly allowed parole evidence to be admitted to interpret the terms of the lease agreement and that it erred in awarding attorney's fees to the Defendants.

b. Statement of Facts

On or about April 1, 1987, the Defendants as tenants entered into a certain lease agreement with McMullin & Company as landlord. The landlord's interest in the lease agreement was subsequently assigned to Roy S. Ludlow Investment Company, the Plaintiff and Appellant in the above-entitled action (Ludlow). (R. at 194) The lease agreement was prepared by the original landlord, McMullin & Company, who was solely responsible for the language of the provisions contained therein. (R. at 284)

Paragraph 2 of the lease agreement set forth the term of the lease as being for the period of three (3) years commencing April 19, 1987 and continuing to May 1, 1990. Notwithstanding this provision setting forth the term, the following sentence was added to the agreement at the bottom of page 6 and in the middle of paragraph 9 of the lease agreement:

> At the end of each year, the tenant and landlord will jointly review the contract for renewal.

At the end of the first year, after the lease had been assigned to Ludlow, the Defendants met with Mr. Ludlow to discuss keeping the lease at the current rent and to point out the option available to them pursuant to the sentence that had been inserted at the bottom of page 6 of the lease agreement. (R. at 195) Mr. Ludlow refused to negotiate any of the provisions of the lease. (R. at 205) Not being a party to the original negotiations, Mr. Ludlow had no idea what the inserted sentence referred to. (R. at 275) Some time thereafter, Mr. Ludlow received notification that the Defendants were vacating the premises. (R. at 205) Some months later, on or about June 8, 1989, after finding a new tenant for the premises, Ludlow brought this action for damages on its lease agreement with Defendants.

Richard Bruce McMullin testified on behalf of Ludlow. Mr. McMullin was the chief operating officer and president of McMullin & Company, the original landlord, and was the party who was responsible for negotiating and drafting the lease agreement with the Defendants. (R. at 189, 284) Mr. McMullin testified that he believed the term intended for the lease was for three (3) years with no option to renew after each of the years. (R. at 191, 278) When asked by

counsel why the typewritten insertion was made to the lease agreement, Mr. McMullin replied as follows:

> The way it's worded here is really a mystery to me. If I wrote this, I'm embarrassed to have written it in such a way because it is ambiguous and I don't recall exactly what it pertained to. To me, to the best of my interpretation of what I was probably getting at in writing this, if in fact I did write it, and I would assume that I did because it appears here. However, I wish it was initialed by both parties. I would assume that it was a review of the common areas and the charges associated with the cam charges. (R. at 181)

When asked by the Court as to why such insertion was placed in this lease when not included in other leases prepared by him, the following dialogue was had:

> MR. McMULLIN: I don't know. Maybe we ought to ask them why I put it in. I don't have any idea.
> THE COURT: You have no recollection why?
> MR. McMULLIN: I really don't, your Honor. I don't recall the purpose of it. To me it doesn't make a lot of sense the way it's presented here. I'm embarrassed that it's even in here. (R. at 182)

Then after making an indication that such insertion referred to common area maintenance costs, Mr. McMullin was asked by

counsel if he had any recollection as to why such insertion was placed in paragraph 9 of the lease agreement rather than paragraph 5, which paragraph pertained to common areas. Mr. McMullin replied as follows:

> I don't. The way it's placed really doesn't make any sense to me. And normally I would initial such an adjustment. And I don't--maybe the Ostlers and Dale Christensen would have a better recall. I really don't recall what the intent of that particular sentence was, placed where it was, without reference to another part of the contract. It's confusing to me. (R. at 186)

After the defense rested, Mr. McMullin was recalled by Ludlow as a rebuttal witness. After having heard the Defendants testify, Mr. McMullin testified that he was able to remember more of the transaction and as a result changed his understanding for the inserted sentence. (R. at 285) Mr. McMullin stated that instead of referring to CAM charges, the inserted sentence was added to meet the Defendants' concerns over the possibility of their business failing. Mr. McMullin testified that the sentence was inserted at the bottom of page 6 to give the Defendants comfort that the lease would be renegotiated if their business failed. (R. at 283)

Mr. Delbert Lawrence Christensen, one of the Defendants and a signatory upon the lease agreement, when asked by counsel, stated that the lease agreement was not signed by him or the other Defendants when first presented to them. (R. at 209) The Defendants felt that they needed something additional in the lease agreement to protect them because they were a brand new company. (R. at 211) Mr. Christensen stated to Mr. McMullin at the time that they were looking for a termination clause after the first year if they had to get out of the lease. (R. at 211) Mr. McMullin then added the sentence at the bottom of page 6 and returned the agreement to Mr. Christensen and the other signatories for execution. (R. at 211-213) While the Defendants expected a three year term, it was with the understanding that if the company could not make a go of it, they would be able to renegotiate or leave. (R. at 229)

Mr. Thomas Ostler, one of the Defendants and signatories on the lease agreement, confirmed the testimony of Mr. Christensen pertaining to the purpose for the sentence inserted at the bottom of page 6. (R. at 251-255) Mr. Neil Ostler, another Defendant and signatory of the lease agreement, confirmed Mr. Christensen's testimony as well. (R. at 263-265) It was the Defendants' testmony that the subject sentence referred to the term of the lease and allowed the

lease to be subject to renewal after each year. But for the provision for renewal being added, the Defendants would not have signed the lease agreement.

After previously denying Ludlow's Motion in Limine and ruling that the sentence inserted at the bottom of page 6 of the lease agreement when viewed in light of paragraph 2 of the lease agreement made those provisions ambiguous, the trial court listened to the testimony of the parties to determine their intent. At the conclusion of both the Plaintiff's and Defendants cases, the trial court felt that the only evidence before it was the testimony of the Defendants themselves as to what the intent of the term provision was. (R. at 308) The trial court found that the testimony of Mr. McMullin was vague, inasmuch as he had stated that he had no recollection of the discussions or negotiations concerning the lease agreement. (R. at 309) The trial court further found that the inserted sentence made no sense in connection with paragraph 9 or paragraph 5. The trial court further found that the language added at the bottom of page 6 clearly referred to the parties renewing the contract at the end of each year. It therefore accepted the Defendants' testimony and found that the Defendants were excused from further performance under the lease agreement. (R. at 310)

As to the payment of attorney's fees, the trial court refused to award any fees under the lease agreement

based on the language of the attorney's fees provision that limited fees to actions brought during the lease term. (R. at 310) The trial court did, however, award attorney's fees to the Defendants under the provisions of Utah Code Ann. §78-27-56.5 (1953, as amended) which provides for a reciprocal right of a party to recover attorney's fees if one party to the contract is allowed attorney's fees under the provisions of such contract.

SUMMARY OF ARGUMENT

Because the trial court determined that the contract was ambiguous and proceeded to find facts respecting the intention of the parties based on extrinsic evidence, the Appellate Court's review is strictly limited. The evidence and all inferences that may be drawn therefrom are viewed in a light most supportive of the findings of the trier of fact and will not be disturbed if the judgment is based on substantial, competent, admissible evidence. To mount a successful attack on the trial court's findings of fact, an appellant must marshal all of the evidence in support of the trial court's findings and then demonstrate that even viewing it in the light most favorable to the court below, the evidence is insufficent to support the findings. Ludlow has failed to do this. Instead of marshaling all of the evidence in support of the trial court's findings, Ludlow has simply emphasized

the portions of testimony that support its conclusions. The trial court's findings are therefore not properly challenged.

ARGUMENT

I

BECAUSE THE LEASE AGREEMENT IS AMBIGUOUS, THE TRIAL COURT PROPERLY ADMITTED PAROLE EVIDENCE TO EXPLAIN THE PARTIES' INTENTION.

Ludlow argues that the trial court improperly admitted parole evidence in varying the terms of the lease agreement entered into between McMullin & Company and the Defendants. The Utah Supreme Court in Union Bank v. Swenson, 707 P.2d 663 (Utah 1985), stated the parole evidence rule as it applies to contract interpretation as follows:

> The parole evidence rule as a principle of contract interpretation has a very narrow application. Simply stated, the rule operates in the absence of fraud to exclude contemporaneous conversations, statements, or representations offered for the purpose of varying or adding to the terms of an integrated contract.

In footnote 1, the trial court further explained the rule as follows:

> Note that although parole evidence is inadmissible to vary or contradict the clear and unambiguous terms of an integrated contract, parole evidence is admissible to clarify facial ambiguity. (emphasis added)

The initial inquiry, therefore, is whether the document on its face is ambiguous. Prior to trial, Ludlow brought a Motion in Limine, wherein Ludlow requested the trial court to rule that the parole evidence rule excluded extrinsic evidence to interpret the lease agreement. After reviewing the Memoranda of the parties, the trial court in its minute entry noted that the lease agreement contained a provision in page 1 establishing the length of term for the lease to be three (3) consecutive full years. Then on page 6 of the lease agreement, under the paragraph entitled "Continuous Operation", the parties typed in the sentence: "At the end of each year, the tenant and landlord will jointly review the contract for renewal." That sentence did not appear to the trial court to apply exclusively to paragraph 9 of the lease. If it did appear exclusively to paragraph 9, it was not clear on its face how it did so. It appeared to the trial court that the sentence applied to the entire lease agreement. However, if applied to the entire lease agreement, it was inconsistent with page 1 of the lease which set the term of the lease at three (3) years. Therefore, the trial court ruled that the subject sentence is indeed ambiguous and that it would be helpful to the trier of fact to receive parole evidence to explain that particular provision of the lease. It therefore denied Ludlow's Motion in Limine. (See copy of Minute Entry attached as an Addendum)

The ambiguity of the provision was borne out in the testimony that was offered by Ludlow. Mr. McMullin and Mr. Ludlow testified on behalf of Ludlow. While Mr. McMullin testified that it was his belief that the term of the lease was for three (3) years unless the Defendants went bankrupt, he testified that the language of the sentence was confusing to him. He had first testified that the language must have applied to CAM charges, which are the subject of paragraph 5 of the lease agreement. After hearing the Defendants' testimony, he changed his testimony and stated that he recalled the conversations over concern of business failure and felt that the sentence referred to a provision to renegotiate the lease in the event of the failure of the Defendants' business. Mr. Ludlow, not being a party to the original negotiations, did not know what was intended by the inserted sentence. He admitted that the language of the sentence was ambiguous and confusing.

Based on all of this, the trial court was correct in determining that the inserted sentence when read with paragraph 2 is ambiguous and unclear as to the parties' intent. It therefore was correct when it admitted parole evidence to clarify the parties' intention.

II

LUDLOW FAILED TO MARSHAL ALL OF THE EVIDENCE IN SUPPORT OF THE TRIAL COURT'S FINDINGS AND THEN DEMONSTRATE THAT EVEN VIEWING IT IN THE LIGHT MOST FAVORABLE TO THE COURT BELOW, THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDINGS.

In Lyngle v. Lyngle, 184 Utah Adv. Rep. 65 (Utah App. 1992), the Utah Court of Appeals explained the court's review of the trial court's findings on the ambiguity of documents. The court stated the following:

> Whether a document is ambiguous is a question of law (citation omitted), which we review for "correctness" (citation omitted), according "no particular deference" to the trial court's conclusion. (citation omitted) However, once the trial court determines a document is ambiguous and "proceeds to find facts respecting the intentions of the parties based on extrinsic evidence, then our review is strictly limited." (citations omitted) We then "review the evidence and all inferences that may be drawn therefrom in a light most supportive of the findings of the trier of fact" and will not disturb the trial court's judgment if it is "based on substantial, competent, admissible evidence." (citations omitted) A document is ambiguous "if it is subject to two plausable constructions" (citation omitted) or its terms are so incomplete they create confusion as to its meaning.

In the present case, as argued above, the inserted sentence led to confusion as to what the term of the lease was to be for. Consequently, the trial court admitted extrinsic evidence to clarify the parties' intention. Ludlow argues that both Mr. Christensen and Mr. McMullin testified that the lease term was for three (3) years and that the only reason that the Defendants requested to get out of the term was because they wanted to lower their rent. While Ludlow takes portions of witness's testimony that would appear to support his conclusions, he fails to marshal together all evidence in support of the trial court's findings and then demonstrate that that evidence is insufficient to support the findings. In this case, Ludlow has omitted the fact that Mr. McMullin testified that he had no recollection as to the negotiations. He further omits the fact that Mr. McMullin, after hearing the testimony of the Defendants, recalled that there was conversation in regards to concerns over the abilities of the new business. While Mr. McMullin originally stated that he felt that the inserted sentence did not apply to the term, but applied to the CAM charges only, his later testimony concluded that he felt that the term was meant to be subject to the parties renegotiation in the event of the Defendants' bankruptcy or business failure. Ludlow also fails to show the testimony of Mr. Christensen as stating that while they intended to enter

into a three (3) year lease, it was their understanding that there needed to be a provision that allowed them to leave after one year in the event that the business did not succeed. Ludlow also omits testimony from Mr. Christensen that the lease agreement as first presented was unacceptable and that the Defendants needed a way out in the event that their business did not succeed. As a result of that concern, Mr. McMullin then inserted the typewritten sentence and returned the document to the Defendants who, understanding that their concerns were met, executed the lease. Ludlow omits the testimony of other signers of the lease agreement that supported and confirmed Mr. Christensen's testimony as to the intention of the parties.

Not having marshaled together that evidence supporting the trial court's findings, Ludlow has failed to properly challenge the trial court's findings. The appeal must therefore be dismissed. The trial court discounted the testimony of Mr. McMullin because of his inability to recall the events. The trial court further rejected the interpretations of Ludlow as being inconsistent with the words of the sentence itself. The words of the sentence more closely supported the interpretation testified to by the Defendants. As a result, the findings of the trial court are not clearly erroneous and must be affirmed.

III

THE APPELLEES ARE ENTITLED TO THEIR ATTORNEY'S FEES PURSUANT TO UTAH CODE ANN. §78-27-56.5 (1953, as amended)

Ludlow argues that the trial court improperly awarded attorney's fees because attorney's fees were not properly plead, because attorney's fees can only be awarded to enforce the provisions of the contract and therefore are not available if the contract is terminated, and because the documents furnished by some of the Appellees do not comply with Rule 4-506 [sic] of the Code of Judicial Administration.

Attorney's fees are available pursuant to paragraph 32 of the lease agreement. That provision limits such fees to $2,500.00. Furthermore, it appears to limit the availability of attorney's fees to an action that is brought during the term of the lease. While attorney's fees may not be available to the Defendants under the lease provision since the action was brought after the lease terminated, such fees would have been available to Ludlow had it prevailed on its assertions that the lease did not terminate until 1990. Being available to Ludlow, such fees are similarly available to the Defendants pursuant to Utah's Attorney's Fees Reciprocity Act, Utah Code Ann. §78-27-56.5 (1953, as amended).

In their answer, the Defendants requested that the trial court dismiss the Plaintiff's Complaint and that they be awarded their attorney's fees incurred in the matter. Contrary to Ludlow's assertions, the Rules of Civil Procedure do not require that attorney's fees be plead by way of counterclaim.

In L&V Leasing, Inc. v. Collin, 805 P.2d 189 (Utah App. 1991), the Utah Court of Appeals held that where a party seeking attorney's fees failed to specify the hourly rate, there was not a failure to comply with Rule 4-505 so long as the legal basis of the award, the nature of the work performed by the attorneys, the number of hours spent to prosecute the claim and some affirmation the fees charged are reasonable in light of the comparable legal services are included in the affidavit submitted by the party requesting the fees.

In the case at bar, the Affidavit furnished by the Appellees Thomas W. Ostler, Neil W. Ostler and John A. Vandermyde, set forth the fact that the billable rate for said Appellees' attorney was $95.00 an hour and that said rate was standard for the firm and in the community. It further stated

that through the trial of the above-entitled matter, affiant expended 33.5 hours at $95.00 an hour, for a total attorney's fee in the amount of $3,182.50. Attached to the Affidavit was a breakdown of the total billings for each month. Counsel for Ludlow cross-examined Attorney Anderson. During that cross-examination, Attorney Anderson described the work that was required for the hours expended. Ludlow's counsel objected to not having a day-by-day breakdown of the hours expended. Having set forth the basis for the award, having explained on cross-examination the nature of the work performed, having set forth the number of hours spent to defend the claim, having affirmed the reasonableness of the fees charged, and having set forth the hourly rate billed to the Defendants, Rule 4-505 has been complied with. The Defendants are entitled to the attorney's fees awarded.

IV

THE DEFENDANTS ARE FURTHER ENTITLED TO ATTORNEY'S FEES ON APPEAL DUE TO THE FRIVOLOUS NATURE OF THE APPEAL.

Pursuant to Rule 33 of the Utah Rules of Appellate Procedure, if the Court determines that an appeal taken under these Rules is frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney's fees, to the prevailing party. The Rule further defines a frivolous appeal

as one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law.

In the case at bar, it is clear from the document as well as the evidence taken at trial by Ludlow's own witnesses, that the provisions in question were ambiguous. Therefore, it is clear that being ambiguous, the law allows for the court to admit extrinsinc evidence in determining the intent of the parties. In allowing that extrinsic evidence, it is also clear that the weight of the evidence supported the trial court's findings and that an appeal would not change that conclusion. Ludlow is feeling secure in its position that attorney's fees will be capped at $2,500.00 regardless of the fees that it requires the other parties to incur as a result of its appeal. The appeal is not well-founded in the law nor on the facts as they were presented by Ludlow itself. Therefore, the court should find the appeal frivolous and should award the Defendants their additional attorney's fees incurred in defending the action on appeal.

CONCLUSION

The trial court's decision dismissing Ludlow's Complaint against the Defendants and awarding attorney's fees in favor of the Defendants must be affirmed. In addition,

the court should award the Defendants their additional attorney's fees incurred in defense of Ludlow's appeal.

Respectfully submitted this 17th day of July, 1992.

John Burton Anderson
Attorney for Defendants Thomas W. Ostler, Neil W. Ostler and John A. Vandermyde

CERTIFICATE OF MAILING

I hereby certify that I delivered four (4) true and correct copies of the foregoing Brief of Appellees, Thomas W. Ostler, Neil W. Ostler and John A. Vandermyde, to the following this 17 day of July, 1992:

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

ROY S. LUDLOW INVESTMENT CO.,	:	MINUTE ENTRY
Plaintiff,	:	Case No. 890903593 CV
vs.	:	JUDGE FRANK G. NOEL
THOMAS W. OSTLER, et al.,	:	
Defendants.	:	

Now before the Court is plaintiff's Motion in Limine. The Court has reviewed the memos filed in support of and in opposition thereto, has reviewed the Lease itself and now rules as follows:

Plaintiff seeks to exclude parole evidence in the nature of an interpretation of the Lease Agreement. Page 1 of the Lease establishes the length of term for the Lease to be three (3) consecutive full years. In Page 6 of the Lease under the paragraph entitled "Continuous Operation" the parties have typed in the sentence "At the end of each year the tenant and landlord will jointly review the contract for renewal." That sentence does not appear to apply exclusively to paragraph 9 (Continous

Operation) of the Lease. If it does appear exclusively to Paragraph 9 it is not clear on it's face how it does so. The subject sentence would appear to apply more appropriately to the entire Lease Agreement. However if that is the case there is an inconsistency between that statement and Paragraph 2 of the Lease which sets the length of term at three (3) years.

Under all of these circumstances the Court is of the opinion that the subject sentence is indeed ambiguous as used in the context of this Lease and rules that it would be helpful to the trier of fact to receive parole evidence to explain this particular provision of the Lease, and accordingly will deny plaintiff's Motion in Limine.

Counsel for defendants is to prepare an order consistent with this ruling.

DATED this 6th day of November, 1991.

FRANK G. NOEL
DISTRICT COURT JUDGE